rescinded, and she is prepared to refund to the Plaintiffs the sum of $16,000 which she has received. By letter dated November 11, 1976 she asked the Plaintiffs to deliver vacant possession of the property not later than December 12, 1976. The Plaintiffs are still occupying it. The Second Defendant asks for an order for damages against the Plaintiffs for their continued occupation after December 15, 1976. The Second Defendant testified that the rental of the house as at the time of the trial of this case (i.e. November, 1979) should be $400 per month. She said that she arrived at this figure on the basis of the rental which her aunt received in respect of a house of the same type. The Second Defendant's husband (D.W.3) testified that the rent of a similar house in the same area in 1976 was between $300 and $350 per month, because he had a friend who rented out a house at $350 per month. He also testified that as at the time of the trial the rent of the property should be about $400 per month. There was no evidence on rental adduced on behalf of the Plaintiffs except that the First Plaintiff testified that the rent of that type of house should be about $250 per month in 1976, but he did not state the basis of his estimate. I accept the Defence evidence and accordingly fix the rent at $300 per month from 1976 to 1978 and $400 per month from 1979 till now. Therefore the amount of rents lost by the Second Defendant from June 1976 to now is estimated at $27,700.

On the Second Defendant's counterclaim I grant order of rescission as prayed, and I further order that the Plaintiffs should deliver vacant possession of the house to the Second Defendant within the three months, and pay to her rent at $400 per month from now till delivery of vacant possession. I award to her damages in the sum of $27,700 in respect of the loss of rents which she has suffered. I also award to her costs. I order that she should refund $16,000 to the Plaintiffs.

I should point out that in the English version of the letter dated June 3, 1976 included in the Agreed Bundle of Documents the word "kesulitan" in paragraph 2 is translated as "encumbrances". I think the literal meaning of "Kesulitan" is "problem" or "difficulty". If it was so translated, such translation would not make any difference to the outcome of this case. I think it would make the Defendants' case even stronger.

Order accordingly.

Solicitors: *Ong Chin Beng & Partners; Kadir, Tan & Ramli; Shook Lin & Bok.*

CHAN SWEE KIN v. TANG WOOI YIN

[O.C.J. (Edgar Joseph Jr. J.) October 15, November 2 & 8; & November 9, 1982]

[Penang – Civil Suit No. 345 of 1982]

Landlord & Tenant – Controlled premises – Possession – Claim for – Defendant locked out of premises – Whether there was a tenancy agreement – Whether defendant was a trespasser – Cross-applications for interim or interlocutory injunctions.

Practice & Procedure – Landlord & Tenant – Claim for possession – Cross-applications for interim or interlocutory injunctions.

There were two cross-applications in this case for interim or interlocutory injunctions, one by the plaintiff and the other by the defendant arising out of an action for possession of certain premises comprised in the ground floor of a shophouse at No. 60 Pitt Street, Penang.

The plaintiff alleged that the defendant was a trespasser having gone into occupation of the premises for purposes of setting up a dental practice while negotiations for a tenancy were in progress but without her consent. The defendant on the other hand relied on an oral tenancy agreement.

Held: (1) the *status quo* should be preserved. Without in any way prejudicing the issues raised by the pleadings, the court was satisfied that the defendant had complied with all the requirements laid down by Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*[4];

(2) there was a serious question to be tried as to whether the defendant occupied the premises as a tenant or trespasser;

(3) since possession of controlled premises was the subject of the suit, damages would not be an adequate remedy for either the plaintiff or the defendant;

(4) a minor breach of the Street, Drainage & Building Act 1974 should not debar the defendant from the interim relief he sought especially when other considerations have been found in his favour;

(5) the plaintiff's application was refused whilst that of the defendant was granted. An injunction was ordered to prevent the plaintiff, her servants or agents from stopping him having access thereto.

Cases referred to:

(1) *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9 C.A.
(2) *Manchester Corpn.* v. *Connolly & Ors.* [1970] Ch. D. 420.
(3) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chai Ngen Yiok* [1975] 2 M.L.J. 109.
(4) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.
(5) *Luganda* v. *Service Hotels Ltd.* [1969] 2 Ch.D. 209, 220.
(6) *Argyll (Duchess)* v. *Argyll (Duke)* [1967] Ch. 302.
(7) *Ford* v. *Foster* (1872) L.R. 7 Ch. App. 611.

CIVIL SUIT.

Tan Beng Hong for the plaintiff.

Ch'ng Theam Inn for the defendant.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: These are two cross-applications for interim or interlocutory injunctions one by the Plaintiff and the other by the Defendant arising out of an action for possession of certain premises comprised in the ground floor of a shophouse, being No. 60, Pitt Street, Penang, (hereinafter referred to as "the premises") which are subject to the Control of Rent Act, 1966.

According to the Plaintiff, the Defendant is a trespasser having gone into occupation of the premises for purposes of setting up a dental practice, no doubt while negotiations for a tenancy were in progress, but without her consent. According to the Defendant, however, there was a concluded oral tenancy agreement which he sought to have confirmed by a document, but which the Plaintiff having had second thoughts about, refused to sign although she endorsed in writing, in Chinese, a number of comments or observations against the various paragraphs, signifying her concurrence with all the major terms thereof.

It is common ground that the Defendant had installed the usual dental paraphernalia and a conspicuous signboard at the premises and, by way of garnishment, appears to have held a reception there to celebrate the establishment of his practice. This is well illustrated by the photographs exhibited to the affidavit of the Defendant affirmed to on 27/7/82 as CBK2 and the photographs handed in by counsel for the Defendant during the argument and admitted by consent as Exh: D1 to D22. It is also common ground that the Plaintiff having objected to the Defendant's presence on the premises proceeded to exclude him from them and this she effectively did by changing the locks and shutting him out. With this, matters came to a head and the Plaintiff having consulted her solicitors commenced proceedings for possession and the usual ancillary reliefs on the grounds I have already briefly alluded to. The Defence, apart from contending that there was a binding oral tenancy agreement between the parties, also seeks by way of counterclaim, an order for specific performance of the unsigned tenancy agreement, being Exh: CSK4, in accordance with the principles enunciated in *Walsh* v. *Lonsdale*[1]

I now return to the cross-applications for interim or interlocutory injunctions which are before me and which, with the consent of counsel, for the sake of convenience, I heard jointly.

The Plaintiff's application, is in effect for a mandatory injunction, designed to give her, the very relief she is seeking at the trial, namely, possession of the premises. Specifically, it is in the following terms:

> "for a grant of an interlocutory injunction pursuant to Order 29 of the Rules of the High Court 1980 restraining the defendant (by himself, his servants or agents or otherwise howsoever) from remaining on or continuing in occupation of the ground floor of premises No. 60, Pitt Street, Penang and further mandatory order that the defendant do remove forthwith his sign-board entitled "Teng Dental Surgery Klinik Pergigian", the partition on the ground floor and the dental equipment from the said premises until the determination of the suit or until such further order."

The Defendant's application, on the other hand, is in effect, designed to restrain harassment and to compel the Plaintiff to allow peaceful re-entry and occupation pending the determination of the suit. Specifically, it is in the following terms:

> "for an injunction that the Plaintiff by herself her agents or servants or otherwise be restrained from locking the front door of premises No. 60 Pitt Street, Penang and denying the Defendant access to the demised premises until the judgment in this action or until further order."

In deciding these applications I have kept in the forefront of my mind, on the one hand, the principle counsel for the Plaintiff has stressed, namely, that where there is no likelihood of any defence succeeding at the trial, the Court can and ought to grant the Plaintiff substantially all or even the whole of the relief claimed at the trial *(Manchester Corpn.* v. *Connolly & Ors.)*[2] and, on the other, the principle contended for by counsel for the Defendant that an interim mandatory injunction is never granted save in exceptional and extremely rare cases *(Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chai Ngen Yiok)*[3].

Having done so, and analysed the affidavit evidence with care, I have arrived at the inevitable conclusion that the *status quo* should be preserved. Without in any way prejudging the issues raised by the pleadings, the determination of which will

most probably depend upon what view the Trial Court takes as to the comparative credibility and reliability of the parties, and their witnesses (if any), I am satisfied that the Defendant has complied with all the requirements laid down by Lord Diplock in the celebrated case of *American Cyanamid Co.* v. *Ethicon Ltd.*[4]. More particularly, I am satisfied that there is a serious question to be tried as to whether the Defendant occupies the premises as a tenant or as a trespasser. I have also considered the question of inadequacy or otherwise of damages to either side and am of the view that since possession of controlled premises is the subject of the suit, I do not consider that damages would be an adequate remedy for either the Plaintiff or the Defendant. From the Plaintiff's point of view, the presence of the Defendant on the premises is nothing short of an encumbrance and prevents her from dealing with her property as she would. It would thus be difficult to measure in terms of money the extent of such a disadvantage. On the other hand, from the Defendant's point of view, his argument is that the proper remedy for the occupant of controlled premises ejected contrary to the Control of Rent Act, 1966, is an injunction requiring the ejector to allow him access and occupation: he is not limited to damages for otherwise this would promote the very mischief which security of tenure under the Act was meant to protect. I am fortified in this view by the following passages in the judgments of Lord Denning M.R. and Edmund Davies L.J., respectively, in *Luganda* v. *Service Hotels Ltd.*[5]:

"... Mr. Luganda is *prima facie* entitled by statute to security of tenure of this room. It was unlawful for the management to lock him out of it: see section 30 of the Act of 1965. They were wrong to take the law into their own hands. If the management had not changed the lock – and Mr. Luganda was still in occupation – I am sure that the court would have granted an injunction to prevent the management from locking him out. They should not be in a better position by wrongfully locking him out. As Lord Uthwatt said in *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173, 203: 'In a court of equity, wrongful acts are no passport to favour.' We must see that the law is observed. To do this, we should, I think, order that Mr. Luganda should be restored to his room. ..."

"... Accordingly, so submitted Mr. Waters, here too the Plaintiff, even assuming that he has been legally wronged, should be left to his claim in damages. What Mr. Waters' submission overlooks, however, is that there is a vitally important difference between that case and the present. In contracts within the Act of 1968 lessees are given six months security of tenure provided section 77 of that Act has been complied with; in other words, to that extent the lessor or licensor *cannot* revoke the contractual right which he has granted, and the lessee or licensee is therefore not restricted to his claim to damages. ..."

For the foregoing reasons, I have no doubt as to the adequacy of the respective remedies in damages available to either party or to both and so the question of balance of convenience does not arise (*American Cyanamid Co.* v. *Ethicon Ltd. ibid* at p. 408E) but, were it necessary to decide this question, I am of the view that the scales are fairly evenly balanced. I say so because if the Defendant is compelled to vacate he would be prevented from embarking on his practice at the premises where he has expended some money, with resulting embarrassment, but he could, of course, find an alternative, if perhaps less strategic site, pending the determination of this suit. However, in the meanwhile the premises may well be decontrolled, let out or sold to third parties and indeed the Plaintiff has frankly said that that is what she may do (See paragraph 2 of her affidavit affirmed to on 30/10/82). If events so transpire and the premises are let out, with perhaps the intervention of rights of third parties as protected tenants, any judgment which the Defendant may obtain at the trial could be nugatory and thus a Pyrrhic victory.

On the other side of the scales, the presence of the Defendant on the premises is nothing short of a thorn in the side of the Plaintiff but one must not forget that she has brought this upon herself. The submission by counsel for the Plaintiff that the Defendant obtained possession, not with the consent of the Plaintiff, but by enlisting the aid of a previous occupant of the premises, to put it mildly, strains credibility. There is not a scrap of evidence to support this submission and I therefore think it would be wrong for me to indulge in mere surmise. Nor do I consider there is any ground for me to presume (as counsel for the Plaintiff has asked me to) that the previous occupant, if called, would give evidence unfavourable to the Defendant. The presumption appearing in illustration (g) to section 114 of The Evidence Act cannot arise in the absence of evidence of "withholding" and is, in any event, discretionary.

The remaining point raised by counsel for the Plaintiff which requires serious consideration was the submission that the Defendant had acted in contravention of the Street, Drainage & Building Act, 1974, when he made additions and alterations and installed the signboard at the premises. To prove this alleged contravention counsel tender-

ed an unaddressed notice purportedly issued under section 72 of the Act and signed by someone on behalf of the Pengarah, Bangunan Bangunan, Majlis Perbandaran, Pulau Pinang, which was put in by consent and marked "A". Assuming, for the sake of argument, that this constitutes proof of such contravention by the Defendant, I do not consider that that would by itself debar the Defendant from the interim relief which he now seeks. In the first place, the Plaintiff as owner of the premises may well be equally liable with the Defendant for such contravention. There is no evidence that she did anything to prevent the Defendant from making the additions and alterations concerned, apart from no doubt complaining to the Local Authority about it but this could easily have been after the disputes arose and might well be considered a self-serving act on her part as counsel for the Defendant has suggested. In the second place, there is no universal rule that a party claiming equitable relief whose conduct is open to criticism on moral or other grounds is for that reason debarred from obtaining relief. The standard of cleanliness required by the equitable maxim must depend upon the circumstances of the case and, specifically, the relief sought: (See e.g. *Argyll (Duchess)* v. *Argyll (Duke)*[6] and *Ford* v. *Foster*)[7].

As I have said, the Defendant here is in effect asking for an interim injunction to restrain harassment and to compel the Plaintiff to allow him peaceful re-entry and enjoyment of the premises pending the determination of the suit. I do not see how, what may well be a minor breach of the Street, Drainage & Building Act, 1974, which the Defendant could easily rectify, if given the chance, should debar him from the interim relief he seeks especially when other considerations have been found in his favour for the reasons already stated.

The result, therefore, is that the Plaintiff's application is refused whilst that of the Defendant is granted upon the usual undertaking as to damages. There will accordingly be orders for an injunction so as to enable the Defendant to go back to the premises and an injunction to prevent the Plaintiff, her servants or agents or any of them or otherwise howsoever from stopping him having access thereto until after judgment in this action. The Plaintiff will have to pay the costs of both applications to the Defendant but there will be an order for early trial.

Order accordingly.

Solicitors: *Tan Beng Hong & Co.; Ch'ng Theam Inn & Co.*

GURDIT SINGH v. PUBLIC PROSECUTOR

[A. Cr. J. (Mohamed Dzaiddin J.) November 22, 1982]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 104 of 1982]

Criminal Law & Procedure – Appeal against sentence – Prosecution sought for substitution of conviction from one under s. 454 to s. 380, Penal Code – Revisionary powers of Court – When court may exercise it. – Penal Code, ss. 380 & 454 – Criminal Procedure Code (F.M.S. Cap. 6) ss. 166, 167 & 325.

Criminal Law & Procedure – Revisionary powers – When Court may exercise it.

The appellant was convicted for an offence under section 454 of the Penal Code and sentenced to 4 years' imprisonment. He appealed against sentence. The Prosecution pointed out that from the evidence in the Appeal Record, the appellant could not have been convicted for an offence under section 454, Penal Code. Instead, he should have been convicted for theft in a dwelling house under section 380 of the Penal Code. The Prosecution requested the court to exercise its revisionary powers under the Criminal Procedure Code by substituting a conviction for a charge under section 380, Penal Code.

Held: (1) in order to satisfy the requirements of sections 166 and 167 of the Criminal Procedure Code, the two main tests as laid down in *Lew Cheok Hin* v. *R.*[3] must be satisfied;

(2) applying these two tests to the present case, the unframed charge was available, but the trial Magistrate failed to scrutinize carefully the effect of the evidence of P.W.1 when he stated that he saw the accused coming out from the back part of his towkay's house. P.W.1 stressed the fact that he saw the accused coming out from the compound and not from the house. For this reason alone the accused should have been convicted for theft in a dwelling house;

(3) the evidence has raised the same issues of fact, i.e. theft, which is relevant to both sections 454 and 380 of the Penal Code;

(4) the requirements of sections 166 and 167 of the Criminal Procedure Code are satisfied;

(5) the court therefore allowed the substitution of the conviction to one under section 380 of the Penal Code and reduced the sentence to 3 years' imprisonment.

Cases referred to:

(1) *R.* v. *Lachiram* I.L.R. 283 Bom. 533, 566.
(2) *Sivalingam* v. *Public Prosecutor* [1982] 2 M.L.J. 172.
(3) *Lew Cheok Hin* v. *R.* [1956] M.L.J. 131, 132.

CRIMINAL APPEAL.

Appellant in person.

Mohamed Shafee bin Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.